

APR 18 2008

JEANNE G. QUINATA
Clerk of Court

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6 **IN THE UNITED STATES DISTRICT COURT**
7 **TERRITORY OF GUAM**

9 UNITED STATES OF AMERICA,

10 vs.

11 IN HYUK KIM aka DOMINIC,

12 Defendant.

CRIMINAL CASE NO. CR07-00064

MOTION TO SUPPRESS

13
14 **INTRODUCTION**

15 Defendant, IN HYUK KIM, by and through counsel, LUJAN AGUIGUI & PEREZ LLP,
16 moves to suppress oral and written statements allegedly provided by him to law enforcement after
17 his arrest on July 31, 2007. These statements are contained in the Report of Investigation, Arrest
18 and Interview of In Hyuk Kim, dated August 8, 2007 and the "Affidavit" of Kim dated July 31,
19 2007, which are attached herewith as **Exhibit A and B** respectively. The alleged statements
20 constitute inadmissible Rule 11 proffer statements and must be suppressed from the trial of this
21 matter.
22

23 **FACTS**

24 Law enforcement agents obtained a warrant to arrest Kim. On July 31, 2007 at
25 approximately 5:00 a.m. law enforcement officers approached Kim at the airport employee
26 parking lot. Their intention was to arrest Kim but to keep his arrest secret. Their hope was to
27 obtain Kim's cooperation. Toward this end, agents had extensive discussions with Kim about Kim
28

1 cooperating in exchange for possible assistance consideration. The agents had advised the
2 Assistant United States Attorney when they arrested Kim. Law enforcement, acting as agents of
3 the Office of the United States Attorney, discussed resolution of Kim's case, although a plea of
4 guilty had never been entered. In the scope of these discussions, Kim allegedly provided oral and
5 written statements to the agents, which statements continued after Kim's attorney arrived.
6

7 Months later, on February 11, 2008, at the motions hearing, the Assistant United States
8 Attorney discussed the applicability of Rule 11 in connection with statements made by Kim. Also
9 at that hearing, law enforcement agents testified.

10 Agent John Duenas testified as follows, *inter alia*:

- 11 1. "We hoped to gain [Kim's] cooperation to identify this Customs and Border Patrol
12 inspector that he alleges he has connections with, and to also try to identify other bar
13 owners or other individuals that are here in the U.S. illegally. (39:11-15).
- 14 2. Duenas had notified the U.S. Attorney's office that Kim had been arrested. (44:21-23).
- 15 3. Law enforcement tried to keep the arrest quiet. (111: 21-24).
- 16 4. Law enforcement hoped to gain Kim's cooperation. (111:25-112:2).
- 17 5. "...there's things in place that we could do that would assist you and assist us should you
18 decide to cooperate, and by one is either sealing a case and nobody needs to know about
19 what's going on..." (112:25-113:4).
- 20 6. "I explained to Mr. Kim my experiences with other defendants, I told him that I've seen
21 worse case scenarios that people go to jail for five, ten years, and I've seen instances where
22 people actually get probation; I said it all depends on your cooperation." (114:13-17).
- 23 7. The way he explained it to Mr. Kim, if he cooperates, then his chances of going to jail are
24 less. (114:18-21).
- 25 8. That was the message Duenas was trying to convey to Kim. (114:22-24).
- 26 9. Duenas was asked: "And you indicated earlier that it was your intention to convey to him
27 the idea that if he cooperated, that he'd be exposed to a lower sentence; right?" (123:7-10).
- 28 10. Duenas replied: "Well, that wasn't - - I was giving him examples, and then that was
conveyed to Mr. Gorman that, hey, we thinks this guy's got good information, this is what
we think he's got, we'd like his cooperation." (123:11-16).

11. Representations were made that Kim's arrest would be kept secret. (133: 17-19).

12. "I gave [Kim] scenarios where I was actually involved in cases where I've seen worse case scenarios where people have gone to jail, five to ten years, and I've seen people who actually away from things, and it depends on how much you cooperate and what kind of information you have. And to – to further substantiate his, his – this scheme, if you will, or – I called up Mr. Gorman and notified him of the arrest and come down because Mr. Kim was willing to cooperate with us, but was worried about going to jail." (134:2-14).

13. "...Mr. Kim wanted to cooperate with us, and I felt that in order to make him feel more confidence, confident about what he was doing was to bring an attorney on board and let him talk to Mr. Gorman." (139: 16-20).

14. "I testified that [Kim] wanted to cooperate, I summoned Mr. Gorman, and after he spoke with Mr. Gorman he continued to cooperate with us." (142:8-11).

15. After Kim made his written statement Kim provided additional cooperation. (143).

16. "We continued to talk to [Kim], and he continued to provide information about his, his scheme or involvement with this I-94." (143:8-12).

The Assistant United States Attorney, acknowledging the applicability of Rule 11, and the inadmissibility of statements made thereunder by Kim, told the Court:

Apparently I'm told that after Mr. Gorman was representing [Kim], he had him interviewed by the agents to see if he could get him substantial assistance. As I told counsel, that would be under Rule 11, and would be considered a Rule 11 proffer, but that could not be used for any reason. (156:2-7).

Agent Richard Flores testified as follows, *inter alia*:

1. Flores remembered Duenas giving examples of Duenas's experiences with people who had these types of cases where some may do ten years and some may do no time. (169:14-22).
2. Flores agreed that Kim had been arrested at 5:00 a.m. in an effort to keep his arrest secret. (169:23-170:1, 171:25-172:2).
3. Flores acknowledged that the hope was that agents would gain the cooperation of Kim. (170:2-4).
4. Kim cooperated. (172:7).
5. When agents were talking with Kim they were trying to gain his cooperation. (173:13-16).

1 6. The idea was to convey to Kim the message that if he cooperated things will be better.
2 (174:1-3).

3 **ARGUMENT**

4 Federal Rule of Criminal Procedure, Rule 11(f) provides, "The admissibility or
5 inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule
6 of Evidence 410." Federal Rule of Evidence, Rule 410 provides:

7
8 Except as otherwise provided in this rule, evidence of the following is not, in
9 any civil or criminal proceeding, admissible against the defendant who made
the plea or was a participant in the plea discussions:

- 10 (1) a plea of guilty which is later withdrawn;
- 11 (2) a plea of nolo contendere;
- 12 (3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of
13 Criminal Procedure or comparable state procedure regarding either the foregoing pleas; or
- 14 (4) any statement made in the course of plea discussions with an attorney for the prosecuting
15 authority which do not result in a plea of guilty or which result in a plea of guilty later
withdrawn.

16 Statements made by a defendant during plea negotiations, including proffer sessions, are
17 inadmissible at trial. *United States v. Velez*, 354 F.3d 190, 194 (C.A.2 N.Y., 2004). In the instant
18 case, the oral and written statements provided by Kim on July 31, 2007, were cooperation proffers,
19 made toward negotiation of a resolution of Kim's case, and are therefore inadmissible at trial.

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1 CONCLUSION

2 The oral and written statements allegedly made by Kim on July 31, 2007 were cooperation
3 proffers, made toward the negotiation of a resolution of Kim's case, and are therefore inadmissible
4 at trial and must be suppressed.

5 Dated this 18th day of April, 2008.

6 **LUJAN AGUIGUA & PEREZ LLP**

7
8 By:



9 **PETER C. PEREZ, ESQ.**

10 *Attorneys for Defendant In Hyuk Kim aka Dominic*

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25 K-0021/878-00/0878/PCP/dmg

EXHIBIT A

DEPARTMENT OF HOMELAND SECURITY
ICE

R E P O R T O F I N V E S T I G A T I O N

TECS ACCESS CODE 3

PAGE 1

CASE NUMBER GM16CR06GM0005

TITLE: IN HYUK KIM

CASE STATUS: INTERIM RPT

REPORT DATE
080807DATE ASSIGNED
022106PROGRAM CODE
2G2REPORT NO.
005

RELATED CASE NUMBERS:

COLLATERAL REQ:

TYPE OF REPORT:
INVESTIGATIVE FINDINGS

TOPIC: ARREST AND INTERVIEW OF IN HYUK KIM

SYNOPSIS:

In Hyuk KIM and Mi Kyung BOSLEY are involved in a scheme to falsify the departure from Guam of Korean nationals who enter Guam under the Guam Visa Waiver program and then overstay their authorized 15 days in Guam in order to work at various nightclubs and karaoke bars. KIM, a Korean Airline employee collects the I-94 cards and submits them to CBP for entry into the Non-Immigrant Information System database when in fact the Korean nationals remain in Guam as overstays. On July 25, 2007, In Hyuk KIM and Mi Kyung BOSLEY were indicted by a federal grand jury in Guam for conspiracy to commit Alien Smuggling in violation of 8USC1324 and 18USC371.

On July 31, 2007 RAC/Guam Agents arrested In Hyuk KIM pursuant to a warrant of arrest issued by the District Court of Guam. In Hyuk KIM cooperated in the investigation and admitted to using his position as an airline employee to falsifying the departure of Korean nationals from Guam. Details of KIM's post arrest interview are provided in this report.

DISTRIBUTION:
RACGM SACHL CAKOSIGNATURE:
FLORES

RICHARD N SPECIAL AGENT

APPROVED:
ROBERTSON

ROBERT D RAC-RESIDENT AGENT IN

ORIGIN OFFICE: GM
GUAM - RAC

TELEPHONE: 0 0 0

TYPIST: FLORES

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DEPARTMENT OF HOMELAND SECURITY
ICE

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R E P O R T O F I N V E S T I G A T I O N
C O N T I N U A T I O N

CASE NUMBER GM16CR06GM0005

REPORT NUMBER: 005

CASE PROGRAM CODES:

2G2 CUC OP PACIFIC RAINB 6D1 ALIEN FRAUD SCHEMES

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R E P O R T O F I N V E S T I G A T I O N
C O N T I N U A T I O N

CASE NUMBER GM16CR06GM0005

REPORT NUMBER: 005

1. On July 25, 2007 In Hyuk KIM aka "Dominic" and Mi Kyung BOSLEY were indicted by a federal grand jury in the District of Guam for Conspiracy to Commit Alien Smuggling, a violation of 8USC1324, 18USC371 and 18USC2. Arrest warrants were issued.

2. On July 31, 2007 at about 5:10 a.m., with the assistance of Guam Customs and Quarantine Agency personnel, KIM was arrested in the employee parking lot of the Guam International Airport as he was getting off from work. Special Agent (SA) Richard Flores along with Task Force Agent (TFA) Erwin Fejeran served KIM a copy of the warrant of arrest and indictment. SA Flores informed KIM that he was being arrested pursuant to the warrant and that he was being transported to the RAC/Guam office for processing.

3. At about 5:30 a.m., SA Flores advised In Hyuk KIM of his constitutional rights at the RAC/Guam office, as witnessed by SA John Duenas. KIM acknowledged, signed and waived his rights and agreed to cooperate with the investigation. KIM provided the following statements to SA Flores and SA Duenas:

A. KIM, a naturalized U.S. citizen and long time resident of Guam, began his employment with Korean Air in 2003 as a passenger service agent.

B. KIM stated that he was first asked by Won Bae SUH, the owner of Club Volvo, to submit an I-94 Departure Record for one of his Korean female employees to Customs and Border Protection (CBP) to make it appear the Korean female had left prior to the expiration of her authorized stay under the Guam Tourist (GT) Visa Waiver Program. KIM explained that he does not remember the female's name and that he only recalls her as being an employee of SUH.

C. KIM received a copy of the female's passport and her original I-94 from SUH and then turned in to CBP the I-94 along with other I-94 Departure records of legitimate departing passengers of Korean Air flights. This would then allow for the employee to remain on Guam past the authorized fifteen days undetected as a Guam Visa Waiver Violator or GT overstay.

D. KIM claimed that initially he received free drinks from SUH's Club in exchange for his service.

E. KIM explained that when the GT overstay wished to return to Korea he would change some of the information such as the date of birth of the departing passenger in the Korean Air computer system to reflect on the flight passenger manifest and not reflect information of the individual's original I-94 that KIM submitted to CBP officials.

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R E P O R T O F I N V E S T I G A T I O N
C O N T I N U A T I O N

CASE NUMBER GM16CR06GM0005

REPORT NUMBER: 005

F. KIM continued to assist SUH with I-94s for approximately a year and was eventually paid \$300.00 to \$400.00 per I-94 Departure Record that he submitted to CBP. KIM claims to have assisted SUH with approximately ten I-94s within one year. KIM stated that he knew the scheme of submitting I-94s to CBP was illegal.

G. Won Bae SUH eventually told other Korean Bar owners of KIM's ability to falsify the departure of Guam Visa Waiver visitors which prompted others to seek KIM's assistance. KIM explained that he was approached by the owners of Big Mama Lounge, located in the Royal Orchid Hotel in Tumon, Guam. KIM was only able to identify the owners as Yuji and Aena, both Korean female. KIM claimed to have submitted approximately five I-94s between the years 2004 and 2005. He claimed to have received \$300.00 per document.

H. KIM then explained that he met Ms. Noh, owner of Club Yeobo, by introduction from the owners of Big Mama Lounge. He explained that he received and sent out approximately five I-94s for Ms. Noh at Club Yeobo and charged her approximately \$400.00 for each document.

I. He also met a Korean female named Yi Jie who was the owner of Apple Lounge through Ms. Noh. KIM said that he received nine I-94s from Yi Jie. KIM recalled that he received about five I-94s in the beginning of 2006 and approximately four more in late 2006. In late 2006, he recalled that he was only paid for three of the four I-94s that were given to him. 29

J. KIM also explained that during the year 2006 he heard rumors of an investigation at the airport, which lead him to discard the I-94s he received as opposed to turning them into CBP. He stated that he still continued to assist in the departure of the GT overstays by changing their passenger information as they checked in for their Korean Air flights back to Korea.

K. KIM further described how he would receive phone calls at work from people he knew who would ask if certain female passengers posing as Guam Visa Waiver Tourists had passed through immigration inspection. He explained that he would only inform the callers if the passengers were in CBP secondary inspection.

L. KIM concluded the interview and provided a written statement in regards to this investigation to SA Richard Flores as witnessed by SA John Uenas.

. On July 31, 2007 at about 10:30 a.m., In Hyuk KIM appeared in the District Court of Guam for his initial appearance. KIM was released on his own recognizance pending trial scheduled for September 24, 2007.

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080807

TECS II - LIST OF RELATED RECORDS

PAGE 2
TN007066

GM16CR06GM0005005 4 RECORDS ARE RELATED TO BASE RECORD
ROI CGM FLORES R 080807

P4932610000CGM AN YE JU A F 110979
SA SUSPECT, ALIEN

SUB-SOURCE

P9G74953200CGM BOSLEY MI KYUNG A F 080776
SC SUBJECT OF CURRENT INVESTIGATION

SUB-SOURCE

P9G74992300CGM KIM IN HYUK D A M 020182
SC SUBJECT OF CURRENT INVESTIGATION

SUB-SOURCE

GM16CR06GM0005 CASE CGM FLORES R 022106
IN HYUK KIM

EXHIBIT B

DEPARTMENT OF THE TREASURY
UNITED STATES CUSTOMS SERVICE

AFFIDAVIT

STATE OF: _____)

COUNTY OF: _____)

I, In Hyuk Dominic Kim

Who after being duly sworn states the following:

I first started sending I-94 that was given to me by Suh/Wonbac. This happened back in 2003. I had recieved from him was \$400 and to drink at the club he owned Club Volvo. I do not recall how many I sent out, but it was around 10. Suh/Wonbac informed other owner such as Yuji and Aena who owned Big mama. I probably sent ~~around~~ ^{around} 4 I-94 per their request and recieved \$300 per person. I then met ~~in~~ Ms. Noh who was close with Aena of Big Mama. Ms Noh later worked at Yeobe Club where I sent 5 I-94 as she requested and recieved \$300 per person. I recieved I-94 from YiJae as request by Ms. Noh. I am thinking I recieved around 4 in early 2006 and 5 additional late 2006. I was told ~~it~~ was for the request of Park/Kwangho and was paid \$1200 for all 4 people and didn't get the other 400 as promised. My last I-94 I sent was early 2007 or late

The contents of this statement are true and correct to the best of my knowledge and belief.

Subscribed and sworn to
before me this 21 day
of July, in the year
2007.

In Hyuk Dominic Kim
Affiant

Richard [Signature]
Special Agent

[Signature]
Witness

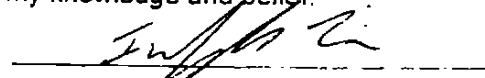
AFFIDAVIT (continuation)


2006. After the first ~~two~~ two or three years of send I-94 illegally, I heard rumors of investigation. I stopped sending I-94 but still received money to send the I-94. I just ~~threw~~^{threw} the I-94 away and made it seem the I-94 was sent. ~~Because~~ Because I work at the airport, people will call me to get information about someone being in secondary or if some came to Guam. In no way did I know that someone was coming unless they were not released by CBP and the manager or owners will call me about a certain passenger. In no way did I falsify in the interpretation conducted. I may know or assume their intent was for working but I am there to interpret the best I can. I received phone calls from Mr. Choi Byoungkuk whenth asking me about Mr. Kim/Douglas. I asked him how he knew Mr. Douglas Kim and how he is associated with him. All he told ~~me~~th me was that someone else was asking. I told him he was held by customs I met Mr. Choi/Byoungkuk when he came to Guam for his honey moon. I was asked by Mr. Kim/Yong Sik to drive them around. It was Mr. Yong Sik through Yuji of Big MAMA to drive and guide Mr. SaYong Kim when he came to Guam for his Honey Moon. In no way was I connected withth with drugs being brought in to Guam.

The contents of this statement are true and correct to the best of my knowledge and belief.

Subscribed and sworn to
before me this 31 day
of July, in the year
2007.


Special Agent


Affiant


Witness


Page 2 of 3

AFFIDAVIT (continuation)

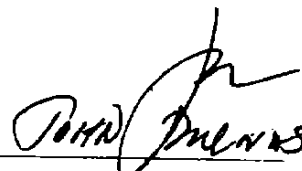
I had ~~dropped~~^{Ik} met Mr. Kim/YongSik before he left Guam. I had picked him up at M&M spa and went to Yang Sanna Club before I dropped him at the airport. He showed me his green card and also informed me that I wouldn't be able to reach him until he takes care of some business with police. He said he would be arrested as soon as he arrives in Korea. This was the last I heard from him. It was later that I was told that he was involved in smuggling drugs. I only found out through Mr. Kim/SaYong because he was asking to find out what had happen to Mr. Kim/DooHwan. Mr. SaYong told me that Mr. DooHwan was involved in smuggling drugs this was a month after the drug smuggling incident. I had to go to the consulate and find out his whereabouts. The only money I recieved from Mr. SaYong Kim was not for me but to buy books for Mr. Dohwan Kim. I had dropped off books at agana precinct.

The contents of this statement are true and correct to the best of my knowledge and belief.

Subscribed and sworn to
before me this 31 day
of July, in the year
2007.


Affiant


Special Agent


Witness

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